NO. 80-317

In The Supreme Court Of The United States

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL.,
Petitioners

v.

WALTER CAMENISCH,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE *AMICI CURIAE* AND BRIEF OF THE DEAF COUNSELING, ADVOCACY AND REFERRAL AGENCY, INC., NORTHERN CALIFORNIA CENTER ON DEAFNESS, INC., GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC., DEAF RESOURCES AND REFERRAL AGENCY OF MARIN, NATIONAL GRAY PANTHERS ACCESS TASK FORCE, ST. BENEDICT'S CENTER FOR DEAF AND HARD OF HEARING, DISABILITY LAW CENTER, LEGAL AID SOCIETY OF ALAMEDA COUNTY, WESTSIDE COMMUNITY FOR INDEPENDENT LIVING, INC., DARRELL MCDANIEL INDEPENDENT LIVING CENTER, INC., DISABLED RESOURCE CENTER, INC., COMMUNITY REHABILITATION SERVICES, EAST SAN GABRIEL SERVICES FOR THE DISABLED, COMMUNITY SERVICE CENTER FOR THE DISABLED, RESOURCE AND EDUCATION NETWORK FOR THE EQUALITY OF WOMEN WITH DISABILITIES, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, WESTERN LAW CENTER FOR THE HANDICAPPED, CATHOLIC SOCIAL SERVICES OF SAN FRANCISCO, HANDICAPPED RESOURCE CENTER, DAYLE MCINTOSH CENTER FOR THE DISABLED, NATIONAL FEDERATION OF THE BLIND OF CALIFORNIA, *AMICI CURIAE* URGING AFFIRMANCE

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

TO: THE SUPREME COURT OF THE UNITED STATES

Deaf Counseling, Advocacy and Referral Agency, et al., respectfully move for an order granting leave to file a brief amici curiae in this case pursuant to Rule 36 of the Supreme Court Rules of 1980. Consent of the attorneys for respondent has been filed. Consent of the petitioners has been refused.

INTERESTS OF THE AMICI CURIAE

Amici are representative of a broad range of organizations located in California, which are working to ensure that handicapped people are more fully integrated into the mainstream of our society. For purposes of description, they may be broken down into three specific categories.

First, five of the organizations provide various social services, such as counseling and job placement, primarily to the deaf and hearing impaired.

In addition, they seek, through education and advocacy, to advance and protect their clients' opportunities for and interest in greater access to society's institutions. Some of these organizations are membership organizations while others are not. All provide services to non-members as well as members.

Second, twelve of the organizations work primarily with the mobility impaired. Some of these groups are also membership organizations. Some of them provide various social services to their clients. They all seek to advance and protect the interests of handicapped people through education and advocacy.

Third, four of the organizations provide direct legal services to handicapped people, and in addition, seek to advance and protect their clients' opportunities for and interests in greater access through legal back-up efforts and litigation.

The Court's interpretation of the meaning of Section 504 in this case will have significant effect on the rights and lives of the members and clients of amici just as this Court's interpretation of Section 504 did in Southeastern Community College v. Davis, 442 U.S. 397 (1979). The holding in that case has had a widespread effect on this nation's disabled and has affected their progress toward equality of access and opportunity.

Specifically, amici are concerned about the issues raised in the petition for certiorari in this case. The requirement of appropriate accommodation under Section 504 is critical to providing greater access for the disabled. A private right of action under Section 504 is vital to amici, especially since federal enforcement efforts are inadequate at best. Finally, a narrow interpretation of Section 504 in terms of the programs

or activities it covers will severely restrict the application of its command not to discriminate and will make enforcement more difficult, whether through administrative efforts or litigation.

QUESTIONS ADDRESSED BY THE AMICI

1. Whether Section 504 of the Rehabilitation Act of 1973 requires recipients of federal funds to make expenditures required to provide access to disabled people?

2. Whether a private right of action exists under Section 504?

3. Whether, to be protected under Section 504, a disabled student must show that the particular class in which he is being discriminated against is receiving direct federal financial assistance?

AMICI'S ASSISTANCE TO THE COURT

Besides a brief argument addressed to question one above, amici will cover in

detail questions two and three above, as the latter are not covered in detail in respondent's brief. Amici will also present the Court with information on how the State of California provides services to disabled students attending the public postsecondary schools to help them comply with Section 504.

For the foregoing reasons, this motion for leave to file a brief as amici curiae should be granted.

Dated: January 27, 1981

Respectfully submitted,

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BRIEF OF AMICI CURIAE URGING AFFIRMANCE

SUMMARY OF ARGUMENT

I. Section 504 requires reasonable accommodation to the needs of disabled persons to insure their access to federally funded institutions. This Court's ruling in Southeastern Community College v. Davis, 442 U.S. 397 (1979), approved the requirement to accommodate. The holding focused on the issue of student qualifications for acceptance to an educational program. Walter Camenisch was qualified for the classes he attended.

Section 504 was enacted to ensure the complete integration of handicapped individuals into the normal living and working patterns of society and the provision of a sign language interpreter for deaf people aids in that integration.

The accommodation requirement of Section 504 is consistent with and pattern-

ed after other Civil Rights legislation, notably Title VI of the 1964 Civil Rights Act, under which this Court has ruled that accommodations may be necessary.

Although the protection of individual rights should not turn on a cost analysis, the provision of a sign language interpreter represents an insubstantial financial burden to the University of Texas.

The provision of a sign language interpreter for Walter Camenisch is essential and fully consistent with the goals of the Rehabilitation Act of 1973. Without an interpreter he would be denied access to the education he needs for his employment.

II. A private right of action exists under Section 504 because all four factors established by this Court in Cort v. Ash, 422 U.S. 66 (1975), are met by that section, and because the analysis of this Court in Cannon v. University of Chicago, 441 U.S. 677

(1979), is applicable to Section 504. Section 504 was enacted for the benefit of disabled people, a group which includes Walter Camenisch, and it created a federal right in favor of that group. There is explicit and implicit evidence of legislative intent to create a private right of action under Section 504. A private right of action is consistent with and essential to the underlying purpose of Section 504. Finally, the question of an implied right of action under Section 504 is an appropriate one for the federal courts to decide.

Exhaustion of administrative remedies is not required in this case because the administrative procedure available under Section 504 is inadequate to protect Walter Camenisch's right as a disabled individual to be free from discrimination. In addition, Walter Camenisch was under time pressure to complete his classes.

Because the administrative process under Section 504 has no provision for ordering immediate compliance by a recipient, Camenisch could not have completed it in time to attend his classes.

The doctrine of primary jurisdiction is not appropriate here.

III. Section 504 and the regulations passed thereunder, 45 C.F.R. § 84.41, provide that the requirements of the law extend to "programs or activities" and recipients receiving federal financial assistance.

Although this Court has yet to rule on the reach of "program or activity," lower court decisions involving educational institutions and student beneficiaries have adopted a "unified entity" rather than a "pin-point" approach to determining the coverage of Section 504. In addition, the purpose of Section 504 and the regulations passed thereunder are broad in their

applicability and define the reach of Section 504 to programs or activities and recipients of federal financial assistance. Adopting a pin-point approach to Section 504 coverage would mean that significant parts of federally funded universities would be outside Section 504's reach and therefore not required to be accessible to the handicapped. Such an unreasonable result is fraught with both logical and practical difficulties that would shackle enforcement efforts and leave unprotected the intended beneficiaries of Section 504.

ARGUMENT
I.

SECTION 504 OF THE REHABILITATION ACT OF 1973 REQUIRES THE UNIVERSITY OF TEXAS TO PROVIDE A SIGN LANGUAGE INTERPRETER FOR WALTER CAMENISCH BECAUSE THAT ACCOMMODATION, INSUBSTANTIAL FOR THE UNIVERSITY, WILL ALLOW CAMENISCH FULL AND EQUAL ACCESS TO THE UNIVERSITY'S CLASSES.

A. Section 504 Requires Recipients of Federal Funds, such as the University of Texas, to Accommodate Qualified Handicapped Individuals, such as Camenisch.

1. This Court's opinion in Davis supports an accommodation requirement.

In Southeastern Community College v. Davis, 442 U.S. 397 (1979), this Court recognized that Congress intends recipients of federal financial assistance to accommodate the needs of qualified disabled people.

The Court held that the deaf student applicant was unqualified to participate in Southeastern's nursing program and therefore not an intended beneficiary of Section 504. Id, at 414. In arriving at that conclusion,

the Court was careful to distinguish between affirmative action obligations, such as those required by Sections 501(b) and 503(a) of the Act, and the duty to accommodate under Section 504.[1] Therefore, "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory." 442 U.S., at 412-413. It is just such a situation that Walter Camenisch has faced. There is no dispute here that he is fully qualified to participate as a student in the University of Texas' academic programs. The dispute is whether or not there is a violation of Section 504 when the University refuses to make available a sign language interpreter so that Walter Camenisch, who is deaf, can participate in those programs. Amici will

[1] The Department of Health, Education and Welfare (HEW) regulation implementing Section 504, which requires, when necessary, the provision of auxiliary aids, such as interpreters, for deaf students, is 45 C.F.R. § 84.44

demonstrate, in Part I.B., infra, that the University's refusal is unreasonable and discriminatory.

2. Public policy supports an accommodation requirement.

The obligation to accommodate the needs of disabled persons is fully consistent with the goals of the Rehabilitation Act of 1973. To secure the "final objective" of the "complete integration of all individuals with handicaps into the normal community living, working, and service patterns," White House Conference on Handicapped Individuals Act of 1974, P.L. 93-516, 88 Stat. 1631 29 U.S.C. § 701 note, the 1973 Act seeks "to develop and implement, through research, training services, and the guarantee of equal opportunity, comprehensive and coordinated programs of vocational rehabilitation and independent living." 29 U.S.C. § 701. In furtherance of this goal, the Act "authorizes grants to assist States to meet the current and future needs of handi-

capped individuals, so that such individuals may prepare for and engage in gainful employment to the extent of their capabilities." 29 U.S.C. § 720(a).

Accommodating Walter Camenisch's deafness by providing him with the services of a sign language interpreter is precisely the kind of action that will result in attaining the goals of the Act because this one accommodation allows Walter Camenisch to participate fully and equally in an educational program that he must complete in order to seek and retain his employment.

Without such an accommodation, the cost burden falls on the already disadvantaged Camenisch. The result is he is forced to either spend more to participate in the University's classes than his fellow hearing students or to forego the remainder of his post graduate education entirely. Any financial barrier that is placed on a handicapped person can only serve,,

at the very least, to inhibit and discourage his "complete integration" into the community --a result that is the exact antithesis of the Act's goals.[2]

On the other hand, state units such as the University of Texas, are easily able to absorb the "occasional" costs of accommodation.

In the long run, of course, the benefits that accrue to a society that not only allows but also encourages its less productive members to become more productive far outweighs the short term costs of the accommodations needed to make that happen.[3]

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[2] Based partly on its finding that "the primary responsibility for meeting the challenge and problems of individuals with handicaps has often fallen on the individual or his family," Congress wanted "all levels of Government to necessarily share responsibility for opportunities for individuals with handicaps." 29 U.S.C. § 701 note.

[3] Sponsors of the Rehabilitation Act of 1973 estimated that of the twenty-two million physically handicapped adults in the United States, approximately fourteen million would be able to work if given the opportunity. 118 Cong. Rec. 3321 (1972).

There have been several cost/benefit analyses conducted of the vocational rehabilitation program, and although differing with respect to the methods used, the studies have agreed that the benefits of the rehabilitation program outweigh its costs from three to five to one. S. Rep. No. 93-318, 93d Cong., 1st Sess., reprinted in [1973] U.S. Code Cong. & Ad. News 2076, 2085.

3. The accommodation requirement is consistent with other similar civil rights legislation.

Section 504 is patterned after earlier civil rights legislation prohibiting different kinds of discrimination in federally funded programs. See, e.g., Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin) (Title VI); Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681 (prohibiting discrimination on the basis of sex) (Title IX).[4]

In Lau v. Nichols, 414 U.S. 563 (1974), this Court held, in a Title VI matter, that a local school district was required to take affirmative steps to rectify the English language deficiency of its students of Chinese ancestry. Id., at 568-569. Thus, the Court has already held that accommodations may be necessary to provide disadvan-

[4] For the text of Title VI, see footnote 12, infra. For the text of Title IX, see footnote 13, infra.

taged students with a meaningful opportunity to participate in an educational program receiving federal funds. This case provides the Court with a similar opportunity to ensure equality of educational access--an opportunity amici submit it must take.

Walter Camenisch's disability provides an even stronger case for accommodation than the language deficiency of the children in Lau because the nature of the disability is fundamentally different. Camenisch cannot overcome his hearing loss by learning to hear so that he may understand the spoken words of his teachers and therefore effectively participate in the University's academic program. Camenisch relys on sign language for spontaneous communication and thus he will always require an interpreter in the classroom.

B. Requiring the University to Provide an Interpreter for Walter Camenisch is Fully Consistent with Section 504.

1. For the University, the required accommodation to Camenisch is insubstantial.

Unlike the circumstances in the Davis case, there need be no modification of the University's educational program to make the accommodation for Walter Camenisch. Furthermore, there is no question that interpreter services to make classroom communication effective are not services of a personal nature contemplated by the HEW regulations. 45 C.F.R. § 84.44(d)(2).

The financial burden, if any, on the University is insubstantial.[5] The cost of providing an interpreter for the summer courses Walter Camenisch needed to attend to complete requirements for a master's

[5] In addition, the administrative burden for the University to either simply pay for an interpreter already secured by Camenisch or even to secure and contract for one of its own does not appear significant.

degree was, at most, a few hundred dollars.[6]

On the other hand, the University is a major public institution of a large state, having a yearly budget in the hundreds of millions of dollars. A significant portion of this budget, $31.4 million, is provided by the federal government. In addition, the University, as a state institution, has the resources of the Texas government behind it.[7]

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[6]Furthermore, the likelihood in this case is that the University has few other deaf students for which it would be required to provide interpreters from its own budget. In his brief, Walter Camenisch points out that, besides the state's vocational rehabilitation agency, several other potential funding sources for interpreter services are available to the University. However, the record is devoid of any indication that the University undertook to tap any of these sources or, indeed, undertook any attempt to provide interpreter services for Camenisch.

[7]The University of Texas' apparent financial concerns are unfounded especially in light of the fact that other states have made a significant commitment to the disabled. Since 1979, California for example has allocated funds to all of its public postsecondary education institutions for the specific purpose of providing services to handicapped students. Budget Act of 1979, 1979 Cal. Stats., ch. 259. As a result, it is now possible for virtually any disabled person who is enrolled at

[footnote continued]

Beyond the fact that the cost of the sign language interpreter here is insubstantial, amici submit that the facilitation of communication, which is an

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one of the state's public institutions of higher education to receive the support services that the student may require to fully participate in the school's academic program, including the provision of sign language interpreters at nc cost to the deaf student.

California has a strong commitment to providing access to the disabled as expressed in its many access laws. See, e.g., Cal. Lab. Code § 1412 (opportunity for employment without handicap discrimination declared a civil right), Cal. Gov't. Code § 19230 (state policy to encourage and enable the disabled to participate fully in the social and economic life of the state), Cal. Civ. Code §§ 54-55.1 (full access to public places), Cal. Gov't. Code § 4450 et seq. (access standards for public buildings), Cal. Gov't Code §§ 11135 et seq. (handicap discrimination prohibited for recipients of state funds). California has taken the position that,

> [T]he duty not to discriminate imposed by the statute implies a corresponding duty to reasonably accommodate the special needs of handicapped persons in order to neutralize the effect of any disabling condition. [And therefore a] prohibition against discrimination in college admission is meaningless if a student can't get through the door or have lecture materials translated into usable form.

Brief of Amicus Curiae of the State of California in Support of Respondent, Southeastern Community College v. Davis, 442 U.S. 397 (1979).

essential educational component, is of such high priority, that its provision should not be subject to any cost-first determination.

> 2. An interpreter is necessary for Walter Camenisch to obtain his master's degree in order to retain and advance in his employment.

The University agrees that without the services of an interpreter, Walter Camenisch could not successfully participate in and complete the University's academic program.

The educational process demands full and unhindered communication to be effective.[8] HEW recognized this fact when it required the provision of auxiliary aids:

> In drafting a regulation to prohibit exclusion and discrimination, it becomes clear that different or special treatment of handicapped persons . . . may be necessary in a number of contexts in order to ensure equal opportunity. Thus, for example, it is meaningless to 'admit' a handicapped person in a wheelchair to a

[8] For a discussion of the role of communication in the education of deaf people, see D. Moores, Educating the Deaf (1978)

> program if the program is offered only on the third floor of a walk-up building. Nor is one providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instructions.

42 Fed. Reg. 22675, 22676 (May 4, 1977).

Thus, an interpreter for a deaf student can be as essential an educational component as a teacher is to any student. In providing the latter, the University should be required to provide the former where necessary.

To similar effect is this Court's observation in Lau v. Nichols, 414 U.S., at 566: "We know that those who do not understand English are certain to find their classroom experience wholly incomprehensible and in no way meaningful." The very same conclusion obtains for those who cannot hear spoken English. Whereas special instruction may be necessary to overcome the communication

gap for non-English speaking minorities, sign language interpreters may be necessary to overcome the communication gap for deaf students.[9]

The importance of the University's academic program to Camenisch is also clearly evident. Without a master's degree he would lose his position as acting dean of students at the Texas School for the Deaf.[10] Camenisch's participation in the University's academic program then, is wholly consistent with and in furtherance of the goals of the Rehabilitation Act of 1973 to "enhance opportunities to rehabilitate the handicapped or otherwise

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[9] Not all deaf students will require sign language interpreters. See D. Moores, Educating the Deaf 268, 269 (1978).

[10] Beyond loss of employment, the high value placed on an advanced degree in today's labor market is well known. It cannot be denied that a master's degree would otherwise help Camenisch in obtaining and advancing his career goals.

In the context of racial discrimination in education, this Court some time ago recognized the importance of education in today's society. Brown v. Board of Education, 347 U.S. 483, 493 (1954).

to qualify them for some useful employment." Southeastern Community College v. Davis., 442 U.S., at 412.

II.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT SECTION 504 OF THE REHABILITATION ACT OF 1973 CONFERS A PRIVATE CAUSE OF ACTION IN FAVOR OF HANDICAPPED PERSONS.

The question presented here is whether, under the test developed in Cort v. Ash, 422 U.S. 66(1975), this Court may properly conclude that a private right of action is implied under Section 504.[11] The

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[11] The Cort test considers the following factors: First, is the plaintiff one of a class for whose benefit the statute was enacted--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any evidence of legislative intent, explicit or implicit, either to create a remedy or to deny one? Third, is an implied right of action consistent with the underlying purposes of the legislative scheme? And fourth, is the cause of action one traditionally relegated to state law in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See Cannon v. University of Chicago, 441 U.S. 677, 688 n. 9 (1979).

It is important to note that section 504 was passed in 1973, two years before the Cort case was decided.

answer is that all four factors of the Cort test are completely satisfied and thus, an implied private right of action exists under Section 504.

A. This Court Should Apply the Same Private Right of Action Analysis to Section 504 That it Applied to Title IX of the Education Amendments of 1972.

This Court's analysis of a private right of action under Title IX in Cannon v. University of Chicago, 441 U.S. 677 (1979), applies equally to the facts of this case. Virtually every factor considered important by this Court in Cannon is present in an analysis of whether a private right of action exists under Section 504. This Court can easily say that Section 504 like Title IX, "presents the atypical situation in which all of the circumstances that the Court has previously identified as supportive of an implied remedy are present." Id., at 717.

1. Section 504 was unquestionably enacted for the benefit of a special class of which Walter Camenisch is a member and creates a federal right in favor of him.

The language of Section 504 is almost identical to the language of Titles VI[12] and IX[13] which this Court held created a federal right.

> With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case. 441 U.S., at 690 n. 13.

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[12] Section 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d, provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

[13] In relevant part, § 901, 86 Stat. 373, as amended, set forth in 20 U.S.C. § 1681, provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

2. There is evidence of legislative intent, both explicit and implicit, to create a private right of action and no evidence of any intent to deny one.

This Court pointed out in Cort v. Ash, 422 U.S., at 82, and Cannon v. University of Chicago, 441 U.S., at 694, that it is not necessary to show an intention to create a right of action in a statute which has granted a class of persons certain rights as long as there is no evidence of a legislative intent to deny one.[14]

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[14] The University's argument that Congress' failure to include handicapped persons under the protections of Title VII, 42 U.S.C. § 2000e, evidences an intention to deny a private right of action, is without merit. Petitioner's brief, at 14. Bills may fail in Congress for many reasons which this Court has never undertaken to guess at. See Cort v. Ash, 422 U.S., at 83 n. 14. In 1978, Congress did act to apply the remedies of Title VI to Section 504. In many ways that is more reasonable than applying the remedies of Title VII, since both Title VI and Section 504 are general non-discrimination provisions, while Title VII applies only to employment. Furthermore, this Court held in Cannon that Congress understood Title VI to create a private right of action, 441 U.S., at 703, so that adopting the remedies of Title VI as opposed to Title VII does not show any intention to deny a private right of action.

There is much evidence that Congress intended to grant a private right of action when it drafted Section 504 in 1973, and again when it amended the Section in 1978. Section 504, like Title IX, was patterned after Title VI.[15] As was true for Title IX and noted in Cannon, by the time Section 504 was enacted in 1973, "Title VI [had]

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[15] This has been noted by a Senate Committee Report:

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of Section 601 of the Civil Rights Act of 1964 . . . and Section 901 of the Education Amendments of 1972 . . . . The language of Section 504, in following the above-cited Acts. further envisions the implementation of a compliance program which is similar to those Acts . . . . This approach to implementation of Section 504, which closely follows the models of the above-cited antidiscrimination provisions, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation and permit a judicial remedy through a private action.

S. Rep. No. 1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News, 6373, 6390-6391 (emphasis added).

already been construed as creating a private remedy." 441 U.S., at 696. In addition, Congress had included Title VI in Section 718 of the Education Amendments which authorized the payment of attorney's fees in private actions. 441 U.S., at 699; Section 718, 86 Stat. 369, codified in 20 U.S.C. § 1617.

By 1973, therefore, Congress had demonstrated its understanding that Title VI created a private right of action. The fact that it patterned Section 504 after Title VI indicated an intention to grant a private right of action under Section 504.

During the years preceding 1973, this Court had decided several implied-cause-of-action cases under other statutes, 441 U.S., at 698 nn. 22 & 23. It was reasonable for Congress to assume, therefore that Section 504 would be interpreted in the same way.

In recent amendments Congress had further clarified its intention to grant a private right of action under Section 504. The 1978 amendments provide for attorney's fees in private actions and apply the remedies available under Title VI to Section 504.[16]

The Section 504 amendment to grant attorney's fees is analogous to the 1976 amendments to 42 U.S.C. § 2000d which granted attorney's fees in private actions under Title IX. This Court noted in Cannon that such an amendment was evidence that Congress believed a private right of action

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[16]The relevant portions of the amendments provide that:

> (a)(2)The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance . . . under section 794 of this title.
>
> (b)In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

29 U.S.C. §§ 794(a)(2), (b) (Supp. 1979).

existed. 441 U.S., at 686 n. 7. The same is true for Section 504.[17] This Court has long adhered to the principle that subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. E.g., Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367 (1969).

Legislative history of those amendments indicates that several members of

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[16] The University has argued that Congress' failure to include Section 504 under the Civil Rights Attorneys Fee Awards Act of 1976, 90 stat. 264, suggests that Congress did not intend to grant a private right under Section 504. Petitioner's Brief, at 15. The language of this Court in Cannon is applicable here,

> The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.

441 U.S., at 711.

In addition, Congress' authorization of attorneys fees in the 1978 amendments to Section 504 makes clear its intention to grant a private right of action under that section,

Congress understood that a private right of action was available under Section 504.[18]

This Court stated in Cannon in reference to similar remarks that, "[a]lthough we cannot accord these remarks the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX and its place within 'the civil rights enforcement scheme' that successive Congresses have created over the past 110 years." 441 U.S., at 687 n. 7. Amici submit that the Court would be equally remiss in ignoring these expressions concerning the scope and purpose of Section 504.

The federal circuits which have considered this issue all have found an

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[18] See, e.g., 124 Cong. Rec. S15593 (daily ed. Sept. 20, 1978) (remarks of Senators Bayh and Cranston); S. Rep. No. 95-820, 95th Cong., 2d Sess. 19 (1978) S. Rep. No. 93-1297, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 6373, 6390-91.

implied right of action under Section 504.[19]

In addition, this Court has impliedly approved a private right of action under Section 504 in Campbell v. Kruse, 434 U.S. 808 (1977), where it remanded the case to

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[19] Kling v. County of Los Angeles, D.C. No. 79 2615 (9th Cir. December 8, 1980); NAACP v. Medical Center, Inc., 584 F. 2d 619 (3d Cir. 1978); Davis v. Southeastern Community College, 574 F. 2d 1158, 1159 (4th Cir. 1978), rev'd on other grounds, 442 U.S. 397 (1979); Trageser v. Libbie Rehabilitation Center, Inc., 590 F. 2d 87 (4th Cir. 1978), cert. denied, 442 U.S. 947 (1979) (with limitations on actions for employment discrimination); Lloyd v. Regional Transportation Authority, 548 F. 2d 1277 (7th Cir. 1977); Leary v. Crapsey, 566 F. 2d 863, 965 (2d Cir. 1977); United Handicapped Federation v. Andre, 558 F. 2d 413, 415 (8th Cir. 1977); Kampmeier v. Nyquist, 553 F. 2d 296, 299 (2d Cir. 1977).

The University cites language from Simpson v. Reynolds Metals Co., Inc., 629 F. 2d 1226, 1229-30 (7th Cir. 1980), in arguing that this Court should not follow the reasoning of Lloyd. Petitioner's Brief, at 12. It is important to note that the Simpson court found a private right under the facts of that case and noted that the administrative remedies under the HEW regulations probably would not be adequate under the standards set out by this Court in Cannon. 629 F. 2d, at 1231 n. 7.

Several district court holdings are also of note. See Whitaker v. Board of Higher Education, 461 F.Supp. 99, 106-109 (E.D.N.Y. 1978); Drennon v. Philadelphia General Hospital, 428 F.Supp 809 (E.D.Pa. 1977); Vanko v. Finley, 440 F.Supp. 656 (N.D. Ohio 1977); Sites v. McKenzie, 423 F.Supp. 1190 (N.D.W.Va. 1976).

the district court to be decided under Section 504 instead of on equal protection grounds.

As this Court indicated in Cannon, Congress' failure to specifically deny a private right of action in light of these court decisions shows that it at least acquiesces and apparently affirms those decisions. 441 U.S., at 703.

All of these factors show that there is sufficient legislative intent under the Cort standard to confer a private right of action under Section 504.

3. A private right of action is consistent with and essential to the underlying purpose of the legislative scheme of Section 504.

The purposes of Section 504 are the same as those for Titles VI and XI: To stop discriminatory practices and to provide individual citizens with effective protection against those practices.[20]

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[20]See S.Rep. No. 1297, 93d Cong., 2d Sess., [footnote continued]

The HEW regulations for Section 504 adopt the procedural provisions applicable to Title VI, and therefore, as under Titles VI and IX, allows only for the termination of federal funds to a recipient as a remedy for discrimination under the Section. 45 C.F.R. § 80.6 - 80.10; Whitaker v. Bd. of Higher Educ. of the City of New York, 461 F.Supp. 99, 107 - 108 (E.D.N.Y. 1978).

This Court said in Cannon:

> True, this Court has sometimes refused to imply private rights of action where administrative or like remedies are expressly available . . . . But it has never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute . . . .

441 U.S., at 707 n. 41.

reprinted in [1974] U.S. Code Cong. & Ad. News 6373, 6388. See also Kampmeier v. Nyquist, 553 F.2d, at 299 (2d Cir. 1977); Lloyd v. Regional Transportation Authority, 548 F.2d 1277, 1285 n. 25 (7th Cir. 1977).

The Whitaker court concluded that the administrative process under Section 504 did not provide an adequate remedy to fulfill the purpose of the section. 461 F.Supp., at 108. This Court should decide here as it did in Cannon, that the remedy of termination of federal funds is,

> severe and often may not provide an appropriate means of accomplishing the second purpose if merely an isolated violation has occurred . . . . Moreover, in that kind of situation it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, or on HEW, the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate. The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with--and in some cases even necessary to--the orderly enforcement of the statute.

441 U.S., at 705-706.

Contrary to the University's argument, HEW has consistently supported a private

right of action under Section 504.[21] See Whitaker v. Bd. of Higher Educ. of the City of New York, 461 F.Supp., at 108; Hearings on Implementation of Section 504 of the Rehabilitation Act of 1973 before Subcommittee on Select Education of the House Committee on Education and Labor, 95th Cong., 1st Sess. (1977) (testimony of David Tatel, Director of HEW's Office for Civil Rights). As this Court indicated in Cannon, HEW's support of a private right is a relevant consideration in determining that a private right of action is consistent with a legislative scheme. 441 U.S., at 682 n. 8.

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[21] The University cites HEW's comments to its Section 504 regulations, 45 C.F.R. pt. 84, App. A, p. 381, in support of the argument that HEW does not support a private right of action. Petitioner's Brief, at 15. In that section, however, HEW merely indicates that it cannot grant a private right of action on its own initiative and notes that several court decisions have found such a right. It does not indicate any opposition to a private right of action.

In the Title IX context, HEW took the position that a private right would assist the agency in achieving the statutory purpose. 441 U.S., at 706-707. The same is true in this case. See Brief for United States as Amicus Curiae. At least one member of Congress has indicated his belief that a private right of action is necessary to effectively enforce Section 504. See S. Rep. No. 95-820, 95th Cong., 2d Sess. 19 (1978) (remarks of Senator Cranston). In the context of other civil rights statutes, this Court has recognized that suits by persons acting as private attorneys general are an invaluable aid to administrative enforcement. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972); Allen v. State Bd. of Elections, 393 U.S. 544, 556 (1969); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 401-402 (1968).

As this Court stated in Cannon, "when [a] remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." 441 U.S., at 703. It should, therefore, find that a private right of action must be implied under Section 504.

4. This issue is clearly a proper one for the federal courts to decide.

This Court settled the issue of federal court intervention in Cannon when it stated,

> Since the Civil War, the Federal Government and the federal courts have been the 'primary and powerful reliances' in protecting citizens against such discrimination. Steffel v. Thompson, 415 U.S. 452, 464 (emphasis in original), quoting F. Frankfurter & J. Landis, The Business of the Supreme Court 65 (1928).

441 U.S., at 708.

Therefore, all the factors of the Cort test are well satisfied by Section 504. To deny a private right of action here

would be to ignore the clear intent of Congress.[22]

B. Exhaustion Should Not Be Required in This Case and the Doctrine of Primary Jurisdiction Should Not Be Applied.

As indicated above, complainants in the administrative process under Section 504 are not allowed to participate in the investigation or subsequent enforcement proceedings. This Court found that that was not an adequate remedy under Title IX.[23]

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[22] Justice Rehnquist's statement in his concurring opinion in Cannon that this Court should be hesitant to imply causes of action in the future, 441 U.S., at 718, does not apply to this case. All the legislative action relevant to this case took place before this Court's decision in Cannon, so that Congress had no opportunity to comply with Justice Rehnquist's suggestion that it specify intent to grant causes of action in the future.

[23] The Court stated:

> For these same reasons, we are not persuaded that individual suits are inappropriate in advance of administrative remedies. Because the individual complainants cannot assure themselves that the administrative process will reach a decision on

[footnote continued]

For the same reason, the Court in Whitaker found that neither exhaustion nor primary jurisdiction should apply. 461 F.Supp., at 108-109. Since Walter Camenisch could not participate meaningfully in the administrative process, it makes no sense to require exhaustion before he seeks redress of his individual grievance in federal court.

Furthermore, the facts of this case were such that Camenisch did not have time to exhaust administrative remedies. It was necessary for him to attend his classes during the summer of 1978 in order to obtain his master's degree so that he could retain his position as acting dean of the school for the deaf. Since the administrative process has no provision for ordering immediate compliance by a recipient, it could in no way be an adequate remedy in this case:

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their complaints within a reasonable time, it makes little sense to require exhaustion. 441 U.S., at 707-708 n. 41.

> [I]t is well settled that administrative remedies need not be sought if they are inherently inadequate or are applied in such a manner as in effect to deny the petitioners their rights.

McCoy v. Greensboro City Bd. of Education, 283 F.2d 667, 670 (4th Cir. 1960). See also Walker v. So. Ry. Co., 385 U.S. 196 (1966); Smith v. Ill. Bell Tel. Co., 270 U.S. 587 (1926); K. Davis, Administrative Law Treatise, §§ 20.01, 20.07 (1958).

The doctrine of primary jurisdiction also is not appropriate in this case. That doctrine is applied in situations where there is no ascertainable standard for a court to enforce and determination of that standard has been delegated to an administrative body assumed to have special expertise in the area. See, e.g., Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 423 (1975); Texas and Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). The doctrine also is

reserved for situations in which "issues of fact not within the conventional experience of judges [are raised]," or where the statutes call for " . . . the exercise of administration discretion." Far East Conference v. United States, 342 U.S. 570, 574 (1952).

Neither of these situations exists in this case. HEW has made clear the standards to be used in deciding this case by issuing detailed regulations implementing Section 504. The federal courts have extensive experience and have shown requisite expertise to adjudicate civil rights claims such as the one Walter Camenisch is pursuing. Therefore, there is no need and no rationale for allowing HEW to take primary jurisdiction over the case.

III.

SECTION 504 APPLIES TO ALL RECIPIENT INSTITUTIONS WHICH RECEIVE FEDERAL FINANCIAL ASSISTANCE AND TO ALL PARTS WITHIN THOSE INSTITUTIONS.

A holding that the reach of Section 504 goes to all parts of the University of Texas comports most closely with the section's statutory purpose as well as the HEW implementing regulations.

The University would have this Court adopt a definition of "program or activity" which would require that a particular part of the University receive direct federal monies before that part is subject to Section 504 coverage. This would, amici submit, contradict the purpose of Section 504 and would have a far-reaching and devastating impact on the handicapped--the intended beneficiaries of Section 504.

A. A "Unified Entity" or "In Toto" Approach is the Proper Standard for Determining Section 504 Coverage for the University of Texas.

The University of Texas receives over $31 million in federal financial assistance for its educational programs. It nevertheless suggests that unless some of that money can be traced to the classes Walter Camenisch attended, he should not expect Section 504 to protect him from discriminatory conduct otherwise prohibited by that section. This narrow or "pin-point" reading of "program or activity" contravenes the law, whereas an "in toto" definition of Section 504 reflects more clearly the language and intent of Section 504 and the regulations adopted pursuant to that law.[24]

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[24] For a discussion of Section 504 language and legislative history, see section III.B., infra.

The law requires that recipient institutions in toto which benefit from federal financial assistance cannot discriminate against the disabled in any program or activity. 45 C.F.R. § 84.41. While there may be no proof that direct federal financial assistance reaches the classes Walter Camenisch attended, the $31 million that the University of Texas receives has beneficial impact on the entire institution, including those classes. As a federal district court has noted:

> federal aid to any program in a school system releases money for other uses, thereby benefitting those programs that are not direct beneficiaries of the federal aid.

Poole v. South Plainfield Board of Education, 490 F.Supp. 948, 951 (D.N.J. 1980).

Lower courts, including the Poole court, have applied an "in toto" or "unified entity" definition to "program or

activity".[25]

The Court in Poole found that although no federal monies could be traced directly to an interscholastic wrestling program in which plaintiff had been denied participation, Section 504 coverage applied to that specific program, it being:

> absurd to ban discrimination in a discrete area of a school system that receives federal funds while permitting it throughout the rest of the system.

490 F.Supp., at 951.

In Simpson v. Reynolds Metals Company, Inc., 629 F.2d 1226 (7th Cir. 1980), the Seventh Circuit rejected a district court's ruling that denied a Section 504 claim on the grounds that

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[25] Although this Court has yet to analyze an in toto standard, in Lau v. Nichols, 414 U.S. 563, 566 (1974), it made no attempt to find or require linkage between federal monies and the specific classes at issue, but rather was content that the "district involved in this litigation receives large amounts of federal financial assistance."

there was no proof that federal monies went directly to the "job category" in question. 629 F.2d, at 1235. The Simpson Court noted that in a matter involving a student beneficiary and recipient educational institution, a "unified entity approach" as applied in Whitaker v. Board of Education of the City of New York, 461 F. Supp. 99 (E.D.N.Y. 1978), and Flanagan v. President and Directors of Georgetown College, 417 F.Supp. 377 (D.C.D.C. 1976), was appropriate for determining the reach of Section 504 coverage. 629 F.2d, at 1233 n. 12.[26]

In rejecting the "pin-point" approach for determining Section 504 coverage, the Simpson court found;

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[26] As a number of lower courts have noted, legislation like Title VI and Section 504 was passed for the "beneficiaries" of the Acts, not the recipients of federal aid. See Carmi v. Metropolitan St. Louis Sewer Dist. 620 F.2d 672 (8th Cir.) cert. denied, 49 U.S.L.W. 3251 (1980); Note, "Title VI, Title IX, and the Private University: Defining 'Recipient' and 'Program or Part Thereof,'" 78 Mich.L.Rev. 608, 620 (1980).

> more persuasive the reasoning of opinions that have rejected this "pin-point" approach to defining what constitutes "[a] program or activity receiving the federal financial assistance." We agree with the result in Simon [v. St. Louis County Police Dept., 14 F.E.P. Cases 1363 (E.D.Mo. 1976)] only insofar as it stands for the principle that private recovery under § 504 is restricted to intended beneficiaries of a federal program but disagree with its suggestion that definition of the program . . . is a matter very narrowly to be determined.

629 F.2d, at 1235.

In Bob Jones University v. Johnson, 396 F.Supp. 597 (D.S.C. 1974), aff'd., 529 F.2d 514 (4th Cir. 1975), Bob Jones was charged with Title VI violations for racially discriminatory admissions' policy.[27] The court found the necessary federal financial link in the form of

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[27] The relationship between Section 504 and Title VI is discussed, supra, at section II and footnote 15. Title VI has been called the "prototype" of Section 504. Trageser v. Libbie Rehabilitation Center, Inc., 590 F.2d 87, 88 (4th Cir. 1978). Should there be any doubt about the relationship [footnote continued]

$400,000 the University received and then disbursed to student veterans entitled to federal benefits. There was no other form of federal aid, either going to University programs or to the admissions department. Nonetheless, the court found that the way in which federal financial assistance is transmitted is "irrelevant" and to "argue otherwise would be to suggest that the applicability of Title VI turns on the role of the University as an exchange." Id., at 603.

The Bob Jones court recognized the need for broad interpretations regarding remedial legislation, citing to President Kennedy's message to Congress in 1963, when he said that the then proposed Civil Rights Act was intended to "make it clear that the federal government is not required by any statute to furnish any

between Title VI and Section 504, the passage of the latter made available to handicapped persons the rights, remedies, and procedures of the former. Carmi v. Metropolitan St. Louis Water Dist., 620 F.2d, at 674.

kind of financial assistance" to any institution which discriminates on the basis of race. 396 F.Supp., at 604.

Finally, the University of Texas has failed to provide any authority which supports its overly restrictive interpretation.[28] It asks this Court to give its imprimatur to a definition that is wholly outside the spirit and intent of Section 504.

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[28]The University cites to several lower court cases and, without discussion, implies these decisions have approved a narrow or "pin-point" approach to Section 504. In every one of these cases but two the charging party was an employee and each court found that neither Section 504, Title VI, nor Title IX was intended to protect employees (unless the employee was a participant in an employment project funded by the federal government) but rather participating beneficiaries, for example, students. These cases consequently are without applicability here. The other two cases are equally inappropriate for a consideration of "program or activity." In both Dougherty County School District v. Harris, 622 F.2d 735 (5th Cir. 1980), and Board of Public Instruction of Taylor County, Fla. v. Finch, 414 F.2d 1068 (5th Cir. 1969), the issue was whether HEW could cut off all funds to recipient institutions when only parts were discriminatory. Both courts ruled such broad-based punishment was unwarranted. The issue here is not whether funds should be cut off to all of the University of Texas but simply whether the reach of Section 504 goes to all of the University.

B. Both Regulatory Language and Legislative History of Section 504 Reveals a Clear Intent to Prohibit Discrimination Based on Handicap by Any Recipient Institution, Including All Parts Therein.

Although Section 504 prohibits discrimination in any "program or activity" without elaborating upon the reach of that phrase, regulations passed pursuant to Section 504 and which play a central role in the administration and enforcement of the law, Doe. v. Colautti, 454 F.Supp. 621, 629 (D.C.Pa. 1978), aff'd., 592 F.2d 704 (3rd Cir. 1979), are expansive rather than restrictive. Subpart E of the HEW regulations applies to:

> post-secondary educational programs and activities . . . that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs and activities.

45 C.F.R. § 84.41[29] (emphasis added).

[29] "Recipient" is defined as:
any public or private agency, institution organization, or other entity, or any
[footnote continued]

The language is conjunctive, applying to both programs and activities and the recipient institution in toto.[30]

The legislative history of Section 504 is discussed, supra, in section II.A.2. It should be noted here that Section 504 was enacted:

> to prevent discrimination against all handicapped individuals . . . in relation to Federal assistance in employment, housing, transportation, education, health services or any other Federally aided programs.

S. Rep. No. 1297, 93d Cong. 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News, 6373, 6388.

It was Congress' intent to initiate a "comprehensive" rather than a restrictive

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person to which Federal financial assistance is extended directly or through another recipient . . . .

45 C.F.R. §84.3.

[30]This Court has stated, for example, that words of a statute should be interpreted in their ordinary, every day sense, Malat v. Riddell, 383 U.S. 569, 571 (1966).

approach to the elimination of discrimination based on handicap. N.A.A.C.P. v. Wilmington Center, Inc., 453 F.Supp. 280, 298 (D.C. Del. 1978).

Finally, Section 504, like Title VI, is "remedial" legislation. Poole v. South Plainfield, 490 F.Supp., at 950. This Court has approved "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purpose." Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); cf. Brennan v. Keyser, 507 F.2d 472 (9th Cir. 1974), cert. denied, Keyser v. Dunlop, 420 U.S. 1004 (1975) (any exceptions to remedial legislation must be narrowly drawn).

In conclusion, should this Court accept the University's definition of "program or activity" it would be forced to reject what it has called an "obligation to honor the clear meaning of a statute,

as revealed by its language, purpose, and history." International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel, 439 U.S. 551, 566 n. 20 (1979).

Adoption of the University's restrictive definition of "program or activity" would contravene the meaning and purpose of Section 504 as discussed, supra. It would encourage recipient institutions like the University of Texas to channel federal monies to programs where there are no handicapped persons and thereby avoid any compliance cost of Section 504. It would force upon the beneficiaries of this legislation the responsibility of finding those parts of the University that receive federal aid in order to ensure Section 504 protection.

Perhaps more importantly, it would sanction existing, or create new discriminatory pockets where protective legisla-

tion would have no reach within the University of Texas and other recipient institutions. It would suggest an absurd analysis of a university's structure for determination of coverage. The French or History departments might be subject to Section 504 coverage while Spanish and Biology might not. Further, within specific departments, only those courses of study or even classes within courses of study, which receive federal aid, might be accessible to the disabled. A handicapped student might face the real possibility of being unable to complete academic work for a degree, if he or she were restricted to only those departments, courses of study or even classes which receive direct federal financial assistance. In such cases the purpose of Section 504 would be effectively defeated, while creating an enforcement nightmare.

The importance of defining "program or

activity" cannot be overstated. If it must be shown that a class or program receives direct federal financial assistance, a university need only be responsive to its own priorities and its own sense of right and wrong in making the rest of its program accessible. Sadly, Walter Camenisch and other handicapped persons have not as yet been able to rely on the largesse of many institutions.

Amici believe that if the University asked this Court to adopt its approach with respect to Title VI (thereby establishing the University's right to prohibit minority students from those classes that do not receive direct aid), this Court would justifiably reject such reasoning, as it should here. It is for all these reasons that this Court, in the remedial spirit of Section 504, should find that Section 504 applies to all parts of the University of Texas.

CONCLUSION

Section 504 was intended to break down the barriers to the disabled. In particular, it was intended to open the institutions of higher learning that have always represented the most significant opportunity for individual growth and advancement. The University of Texas, in denying its legal responsibility to make reasonable accommodations to Walter Camenisch, would have this Court abandon the clear mandate of Section 504 and in effect reconstruct those barriers.

This Court has an opportunity to ensure that Section 504 continues to be meaningful protection for the millions of deaf and other handicapped people as well as a symbol of this Country's commitment to finally bring them into the mainstream of society. In the remedial spirit of Section 504, this Court must affirm the decision below by holding that the

University of Texas is required by Section 504 to make the accommodation sought by Walter Camenisch.

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Respectfully submitted,

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